

To DG Competition
DG Competition, Units A.2, A.4 and O.2 / Hearing Officers
COMP-best-practices@ec.europa.eu

Brussels, 3 March 2010

Subject: *European Banking Federation (EBF) comments on the Commission's Best Practices in the field of antitrust*

Dear Madam or Sir,

The EBF welcomes the Commission's initiative to consult the stakeholders on its three documents relating to the functioning of antitrust procedures. In addition, the Commission's efforts to improve the transparency and the predictability of the antitrust proceedings further are fully supported by the banking industry.

In a spirit of cooperation the EBF would like to share some comments focusing on section 2 of the document "Best Practices in antitrust proceedings" on the investigative phase.

You will be aware that some of these concerns regarding the methodology used by the European Commission when conducting sector enquiries have already been raised (see EBF response to the Commission's consultation on the Antitrust Regulation (1/2003) of 29/9/2008, EBF ref. D1803-2008 attached for further reference.

The Commission is kindly invited to consider the following elements which could in our view improve further the efficiency of the investigative phase in antitrust proceedings.

1. First of all, some elements on finding the right addressee to receive the request for information within the undertaking would be useful. With this in mind, the EBF had proposed sending at least one additional copy of the request e.g. to the management or to the legal department of the company. The management and the legal department should also be informed when interviews are conducted by the Commission as described in paragraph 43 of the document.
2. In Section 2.2 on the initial assessment, paragraph 14 rightly specifies that in the context of requests for information, the attention of the concerned undertakings will be drawn to the fact that it has the privilege of refraining from providing self-incriminating information as well as about the subject-matter and purpose of such investigation. For transparency and efficiency purposes, the document should also provide that 'the undertaking' should be informed of the names of the other entities belonging to the same group to which the request has also been sent.
3. Section 2.5.2 of the document on time limits is, in the EBF view, quite problematic, as it holds that the "time-limit will be at least two weeks from the receipt of the request, for a substantial request for information. However, when the scope of the request is limited, for example if it only covers a short clarification of information previously provided or information readily available to the addressee of the request, the time-limit will normally

be shorter (less than one week)”. An undertaking should be given more time to seek out and collect the information internally and should be given a minimum of one month for a substantial request and a minimum of two weeks for a simpler request.

4. The scope of the Legal Professional Privilege (in Paragraph 2.9) may cause misunderstanding. The EBF would thus like to invite the European Commission to clarify the criteria to the Legal Professional Privilege either in the “Best Practice for antitrust proceedings” or in a separate document. With this in view, the EBF supports a single Legal Professional Privilege which would apply to the corporate law experts’ counselling and to the counselling from external lawyers.
5. Finally the EBF regrets that the need to limit the unnecessary administrative burden for undertakings is not mentioned in the document.

Taking into account these comments, which are mostly of practical nature, would in our view facilitate the collection of information within undertakings and thus help the Commission to collect quality data in good time.

Yours sincerely,



Guido RAVOET
Secretary General

Enclosure: 1

EBF RESPONSE ON THE COMMISSION'S CONSULTATION ON COUNCIL ANTITRUST REGULATION 1/2003

Set up in 1960, the European Banking Federation is the voice of the European banking sector, with over 30 000 billion EUR assets and 2.4 million employees in 31 European Union and EFTA countries. The EBF represents the interests of some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions.

I. General observations

The European Banking Federation (EBF) is pleased to share its members experience thus far on the Council Regulation 1/2003 (the regulation), which defines the rules for the Commission's enforcement of EC Treaty antitrust rules.

The EBF strongly supports the Commission's objective to comply with the five year foreseen feedback calendar for this regulation, to be employed as support for the report envisaged to be presented to the Parliament and the Council on the performance of the regulation, scheduled for 1 May 2009.

On the other hand, the EBF regrets that some issues of primary importance to appraise the functioning of the regulation in the past five years are not broached in the Commission's consultation, including certain points of particular interest to businesses, such as the policy of sanctioning by the European Commission or the failure by the Commission to take into account the efforts made in order to meet the terms of competition law.

The banking sector general feeling is also that the consultation in his format is not entirely adapted to the industry's concerns but more adapted to the authorities in charge of enforcing competition law, i.e. National Competition Authorities (NCA), National Courts and Tribunals or lawyers, rather than to businesses.

In that order the EBF would like to remark some general considerations on the performance thus far of the regulation:

- 1) **General comment:** In general, the EBF welcomes the modernisation of EU antitrust law achieved by the regulation 1/2003. The EBF also acknowledge the efforts made by the Commission, the national courts and the national competition authorities to strengthen a coherent application of antitrust law in the single market.
- 2) **Lack of legal certainty:** Concerning the application of the regulation, it should be stressed that one of the most important concern of the industry is legal certainty. A lack of legal certainty can have a negative impact on the EU because EU projects which necessitate important investments may be postponed or even cancelled, to the detriment of consumers and the industry alike.

This creates indeed important concerns for new projects at EU level such as SEPA. In this respect and although the direct applicability of article 81(3) is considered as a positive step in order to reduce unnecessary bureaucracy, some of our members believe that a greater legal uncertainty has been created for businesses as a result of the implementation of this regulation, with the removal of the possibility to approve (notification)¹.

In the current legal framework, business have to assess themselves the legitimacy of their agreements and, regularly, at the end problems raised are not covered by the existing jurisprudence (case-law/statute law), considering the lack of sufficient cases (especially as regards to article 82 e.g.). The conditions laid down in article 81. 3 appear also to be subject to evolving interpretations, it is therefore difficult for a company to assess compliance with the rules just by looking to past decisions.

Moreover, the possibility of consultation from the European Commission can be summed up in the sole letters of informal guidance enclosed in the highly strict conditions of application, actually rarely used; Even if those guidance are to be welcomed, it remains unfortunately far from achieving legal certainty hence we would suggest enlarging the field of application for these letters of informal guidance.

- 3) **Too systematic application by NCA of article 81 and 82 of the Treaty:** As regards of the application of the regulation, national authorities apply community law (which pre-supposes an impact on intra-community trade) to purely national problems,, accordingly, we would advocate the Commission to review the impacts of the guidelines of trade between Member States in order to have a more strict appraisal.
- 4) **Sectoral inquiries (article 17 Regulation):** A propos of the sectoral inquiries, a number of questions have been raised, especially on the methodology used by the Commission to conduct such inquiries. In the past they indeed have been heavily and costly bureaucratic for the participating companies, namely in retail banking, banks invested an enormous amount of resources in the successive procedures and questionnaires that mobilized bank staff for a long period of time. Banks therefore estimate that the Commission should review the procedure currently in place to facilitate the day to day business operation, in particular by limiting and better focusing questionnaires (as information collection might not always be as easy as perhaps expected by the Commission, given existing figures are spread among entities or available but in different formats and the level of work is therefore sometimes underestimated), as well as by better identifying the employee (actually questionnaire should be sent to the management and the legal department) to address the request for information within the bank. Finally the deadlines are very often too short as the inquiries often requires banks to consult extensively internally various parts of the business in order to give appropriate answers. Costs benefits analysis should also be undertaken in order to assess the value and quality of those inquiries and subsequent conclusions. Strict and serious methodologies have to be used to reliably compare and aggregate data coming in different forms from everywhere in Europe and from different companies.

¹ Under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87.

Also, it would be helpful to demand companies to respond to the questionnaire in one of the working languages of the Commission at least, to guarantee a minimum of translation errors.

- 5) **Requests for information** : more generally, it appears that similar problems in methodology arise for formal request for information, which are sometimes sent to wrong addressees (not anymore existing entities or working employees, wrong addresses or fax numbers) which always create concerns as regards to the time-limit within which the information is to be provided.

Again it would be opportune to send at least additional copy of the request e.g. to the management or the legal department of a company.

- 6) **Competition Compliance company's programs**: currently, the Commission is not taking into account, within its sanction policy, company compliance programs on how to act in accordance with competition law. In the future, the EBF would like the Commission to take such programs into consideration and to allow for extenuating circumstances in case of competition rules infringement such as it is the case in some countries (e.g. US, UK).
- 7) **Enforcement by the Commission – legal privilege of company lawyers**: some of members regret that the Regulation does not recognize the legal privilege of in-house company lawyers in antitrust investigations and therefore call for an equal treatment of both in-house internal lawyers and external lawyers in this respect.

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